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Nos. 07-21, 07-25

IN THE

Supreme Court of the United States

WILLIAM CRAWFORD, *ET AL.*,
Petitioners,

v.

MARION COUNTY ELECTION BOARD, *ET AL.*,
Respondents.

INDIANA DEMOCRATIC PARTY, *ET AL.*,
Petitioners,

v.

TODD ROKITA, *ET AL.*,
Respondents.

On Writs of *Certiorari* to the United States Court of Appeals for the Seventh Circuit

BRIEF OF *AMICI CURIAE* THE CENTER FOR EQUAL OPPORTUNITY AND PROJECT 21 IN SUPPORT OF STATE RESPONDENTS [VOTER ID IMPACT RESEARCH]

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INTEREST OF THE *AMICI*[1]

The Center for Equal Opportunity is a nonprofit research, education, and public advocacy organization. The Center devotes significant time to promoting color-blind equal opportunity and racial harmony, and works to advance race-neutral principles in the areas of education, public contracting, public employment, and voting. The Center, which advocates the cessation of racial, ethnic, and gender discrimination by all public and private entities, has participated as *amicus curiae* before the Court in several matters relating to racial equality under the law.

Project 21, which is an initiative of The National Center for Public Policy Research, promotes the views of African-Americans whose entrepreneurial spirit, dedication to family, and commitment to individual responsibility has not traditionally been echoed by the nation's civil rights establishment. A fundamental tenet of Project 21 is that no American should be denied the right to vote on account of race.

SUMMARY OF ARGUMENT

Petitioners have made two broad assertions regarding the alleged impact of the Indiana voter identification requirement, neither of which comports

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[1] Pursuant to Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part, and that no party or counsel for a party made a monetary contribution intended to fund this brief's preparation or submission. The parties have filed letters with the Clerk of the Court consenting to the filing of any *amicus curiae* brief.

with existing empirical data. First, Petitioners suggest that the Indiana law has an appreciable, negative effect on voter participation in elections. And, second, Petitioners claim that the law's requirements fall disproportionately on certain segments of the population—namely, minorities, the poor, and the elderly.

Neither assertion, however, is consistent with the available empirical data measuring the effects of the Indiana law. The most recent study that examines Indiana concludes there was no negative effect in 2006 from the law with respect to either voter turnout or possible disparate impact on certain segments of the population. The only other available Indiana-specific study is a snapshot telephone poll that was simply not designed to measure the impact of the new law over multiple elections.

Petitioners' assertions are also belied by empirical data and studies that have measured the impact on voter identification laws generally around the country. Those studies have almost universally concluded that voter participation has not been negatively affected by voter identification requirements and that there have not been disparate effects from those identification requirements on certain specific segments of the electorate. The only study purporting to find negative effects from voter ID requirements has been roundly criticized for its dubious methodology and conclusions.

ARGUMENT

The broad question in this case is whether Indiana's present voter ID law is impermissible under the federal Constitution. *Amici* present this brief to explore what the available empirical evidence and social science studies tell us about the actual and potential impact of the Indiana law on voting. Petitioners and their supporting *amici* have posited that the voter ID law imposes a significant burden on voting and voting participation and that the burden falls disproportionately on certain groups—the poor, minorities, and the elderly—who tend to vote Democratic. *E.g.*, Dem. Br. 31-36.

Petitioners' claims find no support in the only published study of voter turnout in Indiana since the implementation of Indiana's voter ID requirement in 2005. The study, conducted by Professor Jeffrey Milyo of the Truman School of Public Affairs at the University of Missouri, found that statewide voter turnout *increased* by about two percentage points after the enactment of voter ID; that counties with a greater percentage of poor and minority voters had a statistically insignificant *increase* in relative turnout; that counties with a greater percentage of elderly or less educated voters had no significant change in relative turnout; and that counties with a higher percentage of Democratic voters had a significant relative *increase* in turnout. *See* Jeffrey Milyo, *The Effects of Photographic Identification on Voter Turnout in Indiana: A County-Level Analysis*, 18-19 (Nov. 2007) (available at http://truman.missouri.edu/uploads/Publications/Report%2010-2007.pdf) ("Milyo").

* * *

Petitioners and their *amici* begin their argument with the presumption that any increase in the "cost" of voting (*i.e.* anything that makes voting, in some sense, more difficult) will necessarily reduce the propensity of eligible voters to actually vote. Dems. Br. 23; Alvarez Br. 5-6. But this assumption is not necessarily true, especially where the issue surrounds incremental prerequisites to voting, and not restriction versus no restriction. In other words, Indiana, like every other state in the country, already has imposed permissible "costs" on voting, like requiring voters to register or requiring some minimal self-identification at the polls (like signing one's name). Any discussion regarding the burden on voting allegedly caused by the Indiana voter ID law must measure the incremental impact of the law relative to other undoubtedly lawful "costs" or limitations. *Accord* Milyo, at 3-4 ("it is highly unlikely that anyone sufficiently motivated to register to vote, inform themselves about the current election issues, and transport themselves to a polling place will then be deterred by the incremental requirement of presenting proper identification at the polls").

The presumption also fails to account for the fact that reductions in voter participation, if the empirical data indeed were to show such reductions, after anti-fraud restrictions are implemented, may be a result of the successful elimination of fraud, not the suppression of legitimate voters. To this end, John R. Lott, in his study, posited three different hypotheses about the possible effects of voter ID laws on voter participation rates:

1. The Discouraging Voter Hypothesis: This hypothesis assumes there is little or no fraud to eliminate and that, to the extent the regulations have any effect, they will discourage legitimate voters from voting.

2. The Eliminating Fraud Hypothesis: This hypothesis predicts that the voter participation rate will decline as the regulations eliminate voter fraud.

3. The Ensuring Integrity Hypothesis: This hypothesis assumes that greater confidence that the election is fair will encourage additional voter participation.

John R. Lott, Jr., *Evidence of Voter Fraud and the Impact that Regulations to Reduce Fraud Have on Voter Participation Rates* (revised Aug. 18, 2006) (available at http://www.vote.caltech.edu/VoterID/ssrn-id925611.pdf) ("Lott"); *see also* Milyo, at 5 ("there exists a long-standing political science literature that does not support recent assertions that photo ID requirements have dramatic and detrimental effects on turnout"). As Lott points out, it also may be true that any or all of these effects can be occurring at the same time. Lott, at 5. Petitioners and their *amici* simply do not acknowledge the possibility that their assumption that voter turnout among legitimate voters will be depressed by voter ID requirements is untrue.

In any event, these hypotheses serve as the backdrop to what the data actually show. And, in this case, the data are clear. The Indiana law has not had a negative effect on voter turnout and has not had a

disparate impact on certain segments of the population.

I. The Empirical Data from Indiana Show That Indiana's Voter Identification Law Has Not Had a Negative Effect on Voter Turnout or a Disparate Impact on Any Segment of the Electorate

A number of studies have been mentioned at various stages of this litigation that purport to measure the actual or potential impact of voter ID requirements on voting behavior. But only two studies concern Indiana specifically, and only one of those studies examines the actual effects of the Indiana voter ID law relative to past elections.

That study, done by Professor Jeffrey Milyo, "evaluates the effects of photographic voter identification requirements implemented in Indiana prior to the 2006 general election." Milyo, at 1. According to Milyo, the comparison between the 2002 general election and the 2006 general election "provides a nearly ideal natural experiment for estimating the effects of photo ID on voter turnout across the 92 counties in Indiana." *Id.* The voter ID law was the only major change in Indiana election law between these elections and both of these elections were mid-term federal elections, neither one of which had a major contested statewide race (the 2006 U.S. Senate race featured the Republican incumbent, Sen. Richard Lugar, running without Democratic opposition). *Id.* at 9.

Milyo measured voter turnout as a percentage of the voting age population (VAP) in each election year and as a percentage of the estimated number of citizens of voting age in each year. *Id.* at 10. Milyo determined that voter turnout as a percentage of VAP was about two percentage points higher in 2006 versus 2002, with the mean change within each county being about 1.76% higher. *Id.* at 12. Milyo concluded that the presence of the Senate race alone at the top of the ticket likely could not explain the increase in turnout. *Id.* Indeed, historically, the presence of a non-competitive Senate race at the top of the ticket tends to lead to lower turnout in Indiana.

Importantly, Milyo's statistical analysis showed that there was no consistent evidence that Indiana counties with higher percentages of minorities, the poor, elderly, or less-educated persons suffered any reduction in voter turnout relative to other counties. *Id.* at 15, 16, 17. Indeed, Milyo's numbers suggested an *increase* in relative turnout for counties with a greater percentage of minorities or poor. *Id.* at 15-16. Furthermore, Milyo found a statistically significant relative *increase* in turnout for counties with a higher percentage of Democratic voters. *Id.* at 17. Simply stated, Milyo—the only available study examining the effect of the Indiana voter ID law at issue here—concludes there was no negative effect on voter turnout and no disparate impact in the communities Petitioners have singled out as being negatively affected by the law.

Milyo's methodology stands in stark contrast to the methodology employed by the only other paper that addresses Indiana specifically. Matt A. Barreto, *et al.*,

The Disproportionate Impact of Indiana Voter ID Requirements on the Electorate (Nov. 8, 2007) (available at http://depts.washington.edu/uwiser/documents/Indiana_voter.pdf) ("Barreto, *et al.* (Nov. 2007)"). Rather than attempt to measure the actual impact of the Indiana law on turnout across multiple elections, the Barreto study is simply a snapshot, telephone poll, taken in 2007, designed to determine what persons in Indiana have "access" to photo identification. It bears noting that in the Barreto study, "access" to identification means actually possessing such identification rather than being qualified or capable of possessing such identification. Thus, a person who is otherwise capable of having an ID but who chooses not to obtain one does not have "access" to an ID under the study. Barreto, *et al.* (Nov. 2007), at 7 n.1.

It is not clear that the Barreto study establishes statistically significant differences among relevant segments of the population with respect to ID "access." The study notes, for example, that there is no statistically significant difference at the traditional 95% significance level between blacks who possess valid IDs with a correct name versus whites with such IDs. *Id.* at 13. The differences between Democrats and Republicans possessing a valid ID is nominal compared to the margin of error in the survey. And there is no indication of any real wealth-based disparity. *Id.* at 21, figure 3 (comparing possession of ID by those earning over $80,000 versus those earning under $40,000).[2]

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[2] The Alvarez *amicus* brief attempts to bolster the credibility of Barreto's Indiana study by citing Barreto's similar study of three

But even putting aside these issues, there are other fundamental problems with the Barreto study. To the extent the study uses "access" to ID as a proxy for who might actually vote, the study fails. The study acknowledges that a number of persons identified as not possessing a valid ID actually voted in 2006 by absentee ballot, which does not require possession of an ID in Indiana. *Id.* at 10 n.6. Indeed, the study fails to take into account any of the possible exceptions to the ID requirement in the Indiana law. Those exceptions permit some segment of the population in Indiana to vote without having "access" to a valid ID as defined in the study. Perhaps this explains why Milyo found no actual impact on voter turnout in any specific segment of the electorate as a result of the law.

Even the conclusions one could draw from the Barreto study, assuming it actually showed what it purports to show, are murky at best. The authors themselves merely "anticipate that photo identification laws will have a marked impact on the likelihood of racial and ethnic minorities being able to vote due not

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western states, California, New Mexico, and Washington. Alvarez Br. at 8 (citing Matt A. Barreto, *et al.*, Voter ID Requirements and the Disenfranchisements of Latino, Black and Asian Voters (Sept.2007) (available at http://vote.caltech.edu /VoterID/apsa07_proceeding_209601.pdf)). But Barreto's western study, if anything, undermines his Indiana work. The only disparate impact that the western study found was with respect to the possession of both a driver's license *and another* identification document—which goes beyond the Indiana requirement. Barreto, *et al.* (Sept. 2007), at 16. That study found no racial disparate impact with respect to the possession of driver's licenses alone. *Id.*

[sic] having the forms of identification required of the Indiana electoral rules." *Id.* at 5 (emphasis added). This is hardly a conclusion about whether voter ID laws generally, and the Indiana law specifically, have any concrete effect on actual voter turnout in any segment of the electorate. Only the Milyo study addresses that central issue.

II. The General Empirical Data Likewise Show That Voter Identification Requirements Do Not Have a Negative Effect on Voter Turnout or a Disparate Impact on Any Segment of the Electorate

The basic conclusion that voter ID laws do not impose serious burdens on voting in general or on any particular segments of the population is consistent with empirical data and studies that do not purport to measure the impact of the Indiana voter ID law specifically.

John Lott's study, which starts with the three hypotheses mentioned above, measures the impact of certain voting regulations on turnout among certain segments of the population. Lott examined county level data for general and primary elections beginning in 1996 and extending through July 2006. Thus, Lott, like Milyo, attempted to measure the impact of changed voting regulations over time. Lott found that "ID requirements have no significant impact on voting participation rates when all the counties for which they are imposed are examined." Lott, at 12. Interestingly, Lott also examined six "hot spots" for voter fraud, which had been identified by the American Center for Voting Rights. He found that requiring

non-photo IDs in those places actually *increased* voting participation, thus supporting the "Ensuring Integrity" hypothesis. *Id.* at 12-13.

In any event, Lott found no statistically significant impact from voting regulations on minorities, the elderly, or the poor. *Id.* at 10-12, 13. And while Lott noted that his study could not evaluate the impact of mandatory photo IDs, given its time frame, Lott found that "what can be said is that the non-photo ID regulations that are already in place have not had the negative impacts that opponents predicted." *Id.* at 13.

Jason D. Mycoff, Michael W. Wagner, and David C. Wilson conducted a different study that examines voting behavior across four elections (2000, 2002, 2004, and 2006) using data from the American National Election Studies (NES). Jason D. Mycoff, *et al.*, *The Effect of Voter Identification Laws on Aggregate and Individual Level Turnout* (Aug. 2007) (available at http://vote.caltech.edu/VoterID/apsa07_proceeding_211715.pdf) ("Mycoff, *et al.*"). That study specifically examines "whether the institutional constraint of stricter voter identification laws decrease, increase or have no effect on voter turnout." Mycoff, *et al.*, at 3. After coding each state's laws into one of six categories based on the stringency of the state's voting requirements, the study analyzed the relationship between the identification requirements and voter turnout. After running the statistical models, the authors concluded, after controlling for the election year, that the state voter identification laws had no significant effect on turnout. *Id.* at 12; *accord id.* at 17 ("concerns about voter identification laws affecting turnout are much ado about nothing").

Another recent study attempting to assess the impact of voter identification requirements was authored by R. Michael Alvarez, Delia Bailey, and Jonathan N. Katz. R. Michael Alvarez, *et al.*, *The Effect of Voter Identification Laws on Turnout* (Oct. 2007) (available at http://www.vote.caltech.edu/media/documents/wps/vtp_wp57b.pdf) ("Alvarez, *et al.*"). Examining aggregate data from elections between 2000 and 2006, the study found no evidence that voter identification requirements reduced voter participation. Using individual data, however, from the Current Population Survey, the study found that the strictest forms of voter identification had a negative impact on voter participation relative to the very weakest requirement—merely stating one's name. Even under this latter finding, however, the study determined there was no discriminatory impact with respect to "nonwhite registered voters." *Id.* at 21.

Significantly, it bears noting that the study's latter conclusion regarding the impact of voter identification clearly has no relevance to the Indiana situation. The authors acknowledge that the negative impact of the more restrictive voter identification requirements is relative to the "weakest requirement of stating one's name" to vote. *Id.* But before 2005, Indiana was a signature-match state, not a state-your-name state. Ind. Code § 3-11-8-25(a) (2005) (repealed 2006). This distinction alone makes it impossible to apply the study's even limited conclusions regarding any possible negative impact of voter identification requirements to Indiana.

Two nearly identical studies—one produced under the auspices of the Eagleton Institute at Rutgers University, and the other separately presented to the 2006 American Political Science Association conference ("Vercellotti and Andersen") by two of the authors of the Eagleton study (together, the "Rutgers Studies")—examined the effect of voter identification turnout requirements on voter turnout in 2004 only, not over time. Timothy Vercellotti & David Anderson, *Protecting the Franchise, or Restricting It? The Effects of Voter Identification Laws on Turnout* (Sept. 2006) (available at http://vote.caltech.edu/voterID/voterID_Turnout.pdf) ("Vercellotti & Anderson"). Milyo characterizes these studies as the only ones to have concluded that ID laws have negative consequences on voter turnout. Milyo, at 6. But Milyo notes serious "methodological problems" with the studies, as well as an issue with the authors' "mischaracterizing their own findings," which does a "disservice to the public debate." *Id.* Indeed, these "Rutgers Studies" have been roundly criticized in the relevant literature and are not even cited in Petitioners' briefing. *See, e.g.*, Milyo, at 6-7; Alvarez, *et al.*, at 4 (study is "methodologically flawed"); David B. Muhlhausen & Keri Weber Sikich, *New Analysis Shows Voter Identification Laws Do Not Reduce Turnout* (Sept. 10, 2007) (available at http://www.heritage.org/ Research/LegalIssues/upload/cda_07-04.pdf) ("Muhlhausen and Sikich").

For example, among the serious problems identified in the literature, Vercellotti and Anderson examine only a cross-section of data in one election, 2004, so their study cannot measure the relative impact of ID

requirements. Milyo, at 6; Alvarez, *et al.*, at 5. By applying a one-tailed test of their hypothesis rather than the more common two-tailed test, they essentially "double[d] their chances of finding statistically significant results." Muhlhausen and Sikich, at 2. In addition, the Rutgers Studies misclassified certain of the voting requirements in the various states. *Id.*

After addressing these and other issues with the Rutgers Studies, Muhlhausen and Sikich re-analyzed the Rutgers data and concluded that voter identification laws "largely do not have the negative impact on voter turnout that the [Rutgers Studies] suggest." *Id.* at 2. And when "statistically significant and negative relationships are found, the effects are so small that the findings offer little policy significance." *Id.* at 2-3.

What is even more questionable is the decision by the Rutgers Studies (and Alvarez) to base their studies on CPS data. Buried in a footnote in the most recent Rutgers Study is this startling admission: "the voter turnout rates reported in the CPS tend to be up to 10 percentage points higher than actual turnout rate for the nation." Vercellotti and Andersen, at 9 n.11. The CPS data rely on self-reporting by the respondents of their voting behavior. As the footnote itself explains, research has shown that people tend to over-report their own voting participation (whether out of embarrassment or otherwise) and that actual voters may tend to participate in CPS studies at a higher rate than non-voters. *Id.* Thus, these authors have based their studies on data they themselves acknowledge are not accurate.

Finally, while the Petitioners do not cite or otherwise rely on the Rutgers Studies to bolster their assertions about the impact of voter ID laws, the Petitioners do mention (Dem. Br. at 12) a survey conducted by the Brennan Center for Justice, an advocacy group that has also filed an *amicus* brief supporting Petitioners in this matter. Brennan Center for Justice, *Citizens Without Proof: A Survey of Americans' Possession of Documentary Proof of Citizenship and Photo Identification* (Nov. 2006) (available at http:// vote.caltech.edu/ VoterID/CitizensWithoutProof.pdf) ("Brennan Ctr."). The Brennan Center poll, however, is hardly a study on par with any of the other materials discussed in this brief. The results are reported in a three-page summary document with no supporting information and no other indicia of reliability.

The survey of 987 randomly selected American citizens was conducted in November 2006. The questions concerned only whether the respondent possessed certain forms of identification and did not address voting behavior.[3] Based on the responses, the Brennan Center drew conclusions about certain segments of the population. For example, they concluded that a quarter of African-American voting-age citizens have no government-issued photo ID.

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[3] The questions themselves are problematic. For example, question one asked specifically whether one possessed a "driver's license or a military ID," even though other forms of photo ID satisfy the Indiana statute. In addition, question three asked about "citizenship documents," but only those documents that the respondent could "quickly find" if he or she "had to show it tomorrow." Yet the urgency implied by that question is not statutorily relevant under Indiana law.

Brennan Ctr., at 3. But that conclusion is based on what statistically is likely no more than 120 African-American respondents from around the country. Indeed, another study, using a much larger sample size of people from California, New Mexico, and Washington, concluded that "Latinos and Blacks were not less likely to have a state driver's license" than their white counterparts. Barreto, *et al.* (Sept. 2007), at 16.[4]

Not surprisingly, at the 95% confidence level, the Brennan Center report notes a margin of error of plus/minus 8% for its racial disparate impact conclusion. And similarly high margins of error appear throughout the survey. As studies go in this area, the Brennan Center survey is plainly the thinnest of them all.[5]

* * *

In short, and consistent with the Indiana-specific Milyo study, the empirical data and studies from

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[4] Interestingly, this same study found that a disparate racial impact *did* exist for non-photo IDs, like bank statements and utility bills. Barreto, *et al.* (Sept. 2007), at 16. This finding casts doubt on the sincerity of Petitioners' contention that HAVA's non-photo ID requirement is the constitutional floor. Dem. Br. at 37-38.

[5] Among other things that call the reliability of the report into question, the Brennan Center survey defines "comparatively low income" as $25,000 on page 2 but as $35,000 on page 3. In addition, in footnote 3, the survey states that 135 of the respondents, nearly 14%, indicated they had *both* U.S. birth certificates and U.S. naturalization papers.

outside of Indiana do not support the conclusion that voter ID laws have any negative impact on voter turnout or disproportionately affect certain specific segments of the population.

CONCLUSION

The judgment below should be affirmed.

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